Malayan Banking Berhad v Basarudin Ahmad Khan

COURT OF APPEAL (PUTRAJAYA) — CIVIL SUIT NO W–02–59 OF 2002
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ABDUL AZIZ MOHAMAD JJCA
23 AUGUST 2004

Contract — Employment contract — Breach — Employee's duties to employer — Duty to perform with due care and skill — Breach of contract — Distinction between warranty and indemnity — Damages — Essential ingredients — Loss — Whether to be proven

Contract — Indemnity — Effect of — Distinction between warranty and indemnity — Damages — Essential ingredients — Loss — Whether to be proven

The respondent (defendant) was a branch manager at the appellant (plaintiff) bank in Tanah Merah. The defendant had executed a fidelity contract. The plaintiff contended that the defendant had committed three breaches of his contractual duties. Firstly, the defendant had approved loans for joint borrowers who were not family members when there was a standing instruction not to do so. Secondly, he failed to comply with the condition that the limit of a loan should be gradually reduced. Thirdly, he breached his implied contractual duty of care and skill by grossly over-valuing property offered by customers as collateral to loans advanced by the plaintiff. Further, the plaintiff claimed that it failed to recover loans advanced in consequence of the defendant's breach. The High Court found that the defendant was in breach of contract in that he had breached an implied term as to care and skill. The judge nevertheless dismissed the plaintiff's claim on the ground that the plaintiff had not proved its losses. Hence, this appeal by the plaintiff.

Held, dismissing the appeal with costs:

(1) The relationship between an employer and employee, being contractual, is subject to the general principles governing the implication of a term in a contract. One such principle is that a term will not be implied if there is no necessity to do so. And the test of necessity is not met where the contract contains a clear express stipulation to the same effect as that sought to be implied (see para 7).

(2) In the case of a promise which is a warranty, ie where a promisor warrants that he will perform or abstain from performing something), a breach thereof gives rise to a right to damages as an incident of the contract. Liability for breach was therefore strict and not dependent upon proof of fault or damage (see para 10).

(3) A promisee in a contract of indemnity must prove that he or she had suffered losses before he or she may succeed. In other words, loss is an essential ingredient of the cause of action whereas it is not so in an action for the breach of a warranty (see para 11).

(4) The defendant's promise in this case was an indemnity. It was imperative for the plaintiff to prove that it suffered the losses alleged in its pleaded case, which in effect it had not done (see paras 17 and 19).

[**Bahasa Malaysia summary**

Responden (defendan) adalah seorang pengurus cawangan plaintif di bank perayu (plaintif) di Tanah Merah. Defendan menandatangani kontrak kesetiaan. Plaintif mengadu bahawa defendan telah memungkiri tiga tanggungjawab kontraknya. Pertamanya, defendan telah meluluskan pinjaman bagi peminjam bersama yang bukan sekeluarga bila mana terdapat arahan yang menghalangnya daripada berbuat demikian. Keduanya, dia gagal mematuhi syarat bahawa had pinjaman harus dikurangkan mengikut tahap. Ketiganya, dia telah memungkiri tanggungjawab kontrak tersirat untuk berjaga-jaga dan mahir. Tambahan pula, plaintif menuntut bahawa dia gagal untuk mengutip balik pinjaman kerana kemungkiran kewajipan defendan. Mahkamah Tinggi memutuskan bahawa defendan telah memungkiri kontraknya kerana defendan telah memungkiri syarat tersirat untuk berjaga-jaga dan mahir. Walau bagaimanapun, hakim menolak tuntutan plaintif atas alasan bahawa plaintif tidak membuktikan kerugiannya. Maka rayuan ini dibuat.

Diputuskan, menolak rayuan dengan kos:

(1) Disebabkan oleh perhubungan di antara pekerja dan majikan adalah melalui kontrak, ia tertakluk kepada prinsip am mengenai kemasukan syarat tersirat dalam sesuatu kontrak. Satu daripada prinsip tersebut adalah syarat tersirat tidak akan dimasukkan jika tiada keperluan untuk berbuat demikian. Dan ujian keperluan tidak terpakai apabila kontrak tersebut sudah ada nyataan yang jelas seperti yang ingin disirat (lihat perenggan 7).

(2) Dalam kes janji yang mana adalah waranti, iaitu di mana penjanji warantikan bahawa dia akan membuat atau tidak akan membuat sesuatu), kemungkiran membangkitkan hak untuk ganti rugi sebagai satu iringan kepada kontrak tersebut. Liabiliti untuk kemungkiran adalah ketat dan tidak bergantung kepada pembuktian kesalahan atau kerugian (lihat perenggan 10).

(3) Penerima janji dalam kontrak tanggung rugi harus membuktikan bahawa dia telah mengalami kerugian sebelum tuntutannya dibenarkan. Dalam lain kata, kerugian adalah inti pati yang penting bagi kausa tindakan manakala bukan begitu bagi kemungkiran waranti (lihat perenggan 11).

(4) Janji defendan dalam kes ini adalah tanggung rugi. Ia adalah penting untuk bank plaintif untuk buktikan kerugian seperti yang diplidkan, dalam mana secara efektifnya ia tidak berbuat begitu (lihat perenggan 17 dan 19).

Notes

For cases on breach of employment contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3048–3052

For cases on indemnity, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3728–3738

For contracts of indemnity, see 23 *Halsbury's Laws of Malaysia*, para [390.104]

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd [1999] 2 MLJ 500 (refd)
Allan v Pratt (1888) 13 App Cas 780(refd)
Birmingham & District Land Co v London and North Western Railway (1886) 34 Ch D 261(refd)
Harmer v Cornelius (1858) 141 ER 94 (refd)
Krishnaswami Iyer v Raghaviah Chetty AIR 1928 Mad 43 (refd)
Lipshitz v Valero (1948) AC 1(refd)
Lister v Romford Ice & Cold Storage Co Ltd [1957]1 AC 555 (refd)
Macfarlane v Leclaire (1862) 15 Moo P C 181 (refd)
Meghji Lakhamshi and Brothers v Furniture Workshop [1954] AC 80 (refd)
Montagu Stanley & Co v JC Solomon Ltd (1932) 2 KB 287(refd)
Moschi v Lep Air Services Ltd [1973] AC 331 (refd)
Robb v Green (1895) 2 QB 315 (refd)
Vic Van Isle Construction Ltd v School District No 23 (Central Okanagan) 69 ACWS (3d) 1051 (refd)

Legislation referred to

Contracts Act 1950 s 77
Courts of Judicature Act 1964 s 68(1)(a)
Eastern African (Appeal to Privy Council) Order of Council 1951 art 3(a)

Lambert Rasa-Ratnam (Foo Joon Liang with him) (Lee Hishamuddin) for the appellant
M Rejenthirakumar (Hiu Yeat Fong with him) (Kumar & Associates) for the respondent

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is a tolerably plain case. It involves an elementary point of law. It is the main point in the case. It has to do with the distinction between a right to an indemnity and a right to damages. It is as a result of confusion between these two concepts that has resulted in this litigation. The facts relevant to the point are not in dispute. For convenience, I will refer to the parties in accordance with the title assigned to them in the court below. This is the plaintiff's appeal.

[2] The plaintiff is a bank. At the material time, the defendant was the manager of the plaintiff's branch at Tanah Merah. Upon his engagement with the plaintiff, the defendant executed a fidelity contract. It is dated 16 June 1979. The relevant part of the promise made by the defendant reads as follows:

> I hereby agree that I will, during all the time that I continue in the employment of the Bank in any capacity, faithfully, diligently and carefully attend to the business of the Bank, and *to the best of my skill and ability perform all duties which may be required of me*, and observe and execute all such instructions or regulations as have been or may be given to me from time to time by any one in the employment of the Bank who may be set over me … *that I will on demand pay and make good to the Bank the amount of all loss, damage and expense which may be sustained or incurred by the Bank by or through the non-fulfilment of any of the obligations hereinbefore contained, or by or through any act, neglect or default done, permitted, or suffered by me at any time while I continue in the employment of the Bank.*

[3] It is the plaintiff's case that the defendant has committed three breaches of his contractual duty. First, the defendant approved loans for joint borrowers who were not family members when there was a standing instruction that he was not to do so. Second, he failed to comply with the condition that the limit of a loan should be gradually reduced. Third, he breached his 'implied' contractual duty of care and skill by grossly over-valuing property offered by customers as collateral to loans advanced by the plaintiff. The plaintiff goes on to claim that it has failed in its efforts to recover the loans advanced in consequence of defendant's breach of duty.

[4] The plaintiff brought an action to recover the loss it suffered by reason of the defendant's breach of contract. The learned judge found that the defendant was in breach of contract. In making this finding, the learned judge acceded to the submission by the plaintiff's counsel that the defendant had breached an implied term as to care and skill. The judge nevertheless dismissed the plaintiff's claim on the ground that the plaintiff had not proved its losses.

[5] Before addressing the arguments on the main point in this case, there is one matter that I find convenient to deal with here. It concerns the question about the implied term urged by the plaintiff and, as I have said, accepted by the learned trial judge. In support of its argument for implying a term in the defendant's contract of employment, counsel for the plaintiff cited *Lister v Romford Ice & Cold Storage Co Ltd* [1957] 1 AC 555. That case affirmed earlier authority which supported the proposition that it was to be implied in a contract employment that the employee will carry out his duties with good faith and fidelity (*Robb v Green* (1895) 2 QB 315) and that he would exercise reasonable care and skill in the performance of his duties (*Harmer v Cornelius* (1858) 141 ER 94).

[6] It is now settled law that the relationship between an employer and his employee is one founded on contract. As Lord Radcliffe said in his famous dissent in *Lister v Romford Ice & Cold Storage Co Ltd*:

> Since, in modern times, the relationship between master and servant, between employer and employed, is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract.

[7] The relationship between an employer and employee being contractual, it is subject to the general principles governing the implication of a term in a

contract. One such principle is that a term will not be implied if there is no necessity to do so. And the test of necessity is not met where the contract already contains a clear express stipulation to the same effect as that sought to be implied. As Gibbs J said when delivering the judgment of the British Columbia Court of Appeal in *Vic Van Isle Construction Ltd v School District No 23 (Central Okanagan)* 69 ACWS (3d) 1051:

> There is a constant theme running through implied term cases and that is that a term will not be implied in the absence of necessity being shown. For a discussion of the necessity factor see p 429 *et seq* of *Canadian Pacific Hotels v Bank of Montreal* [1987] 40 DLR (4th) 385.

[8] In the present instance, there is an express promise in terms of the one which the plaintiff seeks to have implied. Here, the defendant has expressly promised that he will — to quote from the contract in this case — '*to the best of my skill and ability perform all duties which may be required of me*'. There is therefore no necessity to imply a term to the identical effect. For, it is a principle of great antiquity that a court will not act in vain. It is therefore my judgment that the submission of learned counsel for the plaintiff on this point is without merit. With that I now turn to the principal issue in this case.

[9] To recall, what the defendant promised the plaintiff in this case is that he would — again to quote from his contract — '*on demand pay and make good to the Bank the amount of all loss, damage and expense which may be sustained or incurred by the Bank by or through the non-fulfilment of any of the obligations hereinbefore contained, or by or through any act, neglect or default done, permitted, or suffered by me*'. Learned counsel argues that on its true construction this promise is an indemnity and is not a mere warranty. The distinction is important.

[10] In the case of a promise which is a warranty (which expression I use to denote a situation where a promisor warrants that he will perform or abstain from performing something), a breach thereof gives rise to a right to damages 'as an incident' of the contract. Put another way, the duty of the promisor to perform the primary obligations under the particular contract is by implication of law substituted with a duty to pay damages *in lieu* of such performance (see *Moschi v Lep Air Services Ltd* [1973] AC 331; *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd* [1999] 2 MLJ 500). Liability for breach is therefore strict and is not dependent upon proof of fault or damage. The innocent party is, subject to the rules as to remoteness, entitled to recover damages from the contract breaker. Even if the innocent party has in fact suffered no damages, it is entitled to recover at least nominal damages. So, if X warrants that he will mow Y's lawn for RM100 and he fails to perform, Y may recover damages from X for the non-performance of his warranty. If it costs Y RM90 to get Z to do the work, he can still recover damages for breach of contract from X for the inconvenience of finding Z to do the work, though he may only recover nominal damages.

[11] But a contract of indemnity is very different. By definition, it is a contract 'by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person'. See, s 77 of the Contracts Act 1950. In consequence, a promisee in a contract of indemnity must prove that he or she has suffered loss before he or she may succeed. In other words, *loss is an essential ingredient* of the cause of action whereas it is not so in an action for the breach of a warranty.

[12] This elementary but important difference between a warranty and an indemnity is adverted to in several decided cases. In *Montagu Stanley & Co v JC Solomon Ltd* (1932) 2 KB 287, the plaintiffs were stockbrokers and members of the Stock Exchange. The defendants were also stockbrokers but not members of the Stock Exchange. The plaintiffs and the defendants entered into a written agreement under which the defendant agreed that in consideration of receiving 50% of any commission on business introduced by them to the plaintiffs they would be liable for 50% of any 'loss sustained' by the plaintiffs in connection with such business. The defendants introduced one Whitburn to the plaintiffs. Whitburn, through his transactions became indebted to the plaintiffs. He executed a deed of assignment of his property for the benefit of his creditors to which the plaintiffs and defendants assented. The plaintiffs claimed they had suffered a loss on the execution of the deed of assignment within the meaning of the agreement they had with the defendants. An action brought by them to recover 50% of the debt was dismissed by Horridge J. An appeal to the Court of Appeal failed. Greer LJ said:

> All that was agreed was that the defendants would be liable to the plaintiffs for 50%, of any loss sustained by them. Two points of time were put forward by the plaintiffs as the dates on which they say a loss was sustained by them, first, the date of the payment becoming due from the client to them as brokers and the payment not being made. That seems to me to be unarguable. Many debtors fail to pay on the due date, but it cannot be said that the money not then paid is lost money. Secondly, it is said that the date when the loss was sustained was that on which the deed of 30 July 1931, was executed. What the plaintiffs thereby took was not something of no value but was something that was regarded by them as of more value than the right to sue the debtor. It is impossible to say that, because the money debt has been converted by the creditor into the acceptance of something valuable, the whole debt has thereby been lost, that is to say, that there has been a complete loss of the amount of the money owing. Assume that the brokers had accepted from the client, in place of their debt, the client's house or other property which might not be saleable at the moment but would be saleable at some future time with a reasonable expectation of reducing the amount of the debt. Could it be said that at the date on which the property was accepted in exchange for the debt there had been a loss sustained of the total amount of the debt? To me it seems quite impossible. Although it is not necessary in this case to decide the point, I think that if the result of what has happened is that the plaintiffs have to give up any interest on their money for a long time, the loss of that interest might be a 'loss sustained' in connection with the business and might give a right to recover it.

That, however, is not the case with which we are concerned. The plaintiffs say they have lost the whole amount of the debt. My difficulty has been to appreciate that such a point is arguable. Horridge J was obviously right, and the appeal must therefore be dismissed.

[13] In the same case, Slesser LJ said:

The agreement under consideration is in two parts, first, an obligation by the plaintiffs to pay to the defendants 50%, of the commission received on business introduced by the defendants. So far it is an ordinary agency agreement. Then there is a second limb which says that the defendants shall be liable for 50% of any loss sustained by the plaintiffs. *It is not an express agreement to answer for the debt of another but an agreement to indemnify against loss which may occur. That being so, it is incumbent on the plaintiffs to show that a loss has been sustained in connection with the business.* No attempt was made to prove such a loss, no evidence being adduced. The plaintiffs rely on the execution of the deed of assignment by Colonel Sofer Whitburn to show that there has been a total loss; but we do not know that under the terms of that deed the whole or a great part of the money may not yet be obtained. All these matters are left in complete obscurity and the plaintiffs have failed to show any present loss sustained by them under the agreement. The condition of liability not having been satisfied the claim fails and the appeal must be dismissed.

[14] In *Birmingham & District Land Co v London and North Western Railway* (1886) 34 Ch D 261, Bowen LJ adverted to the distinction as follows:

But it is quite clear to my mind that a right to damages, which is all that the defendants have here if they are entitled to anything, is not a right to indemnity as such. It is the converse of such a right. A right to indemnity as such is given by the original bargain between the parties. The right to damages is given in consequence of the breach of the original contract between the parties. It is an incident which the law attaches to the breach of a contract, and is not a provision of the contract itself.

[15] And in the same case, Fry LJ said:

Now in my view the word 'indemnity' in the rule which we have now to construe, means to express a direct right either at law or in equity to indemnity as such, and I think that this right has to be contrasted, and not to be for a moment confounded, with the right to damages which arises either from a breach of contract or from tort. Let me take in the first instance the case of a breach of contract. A breach of contract gives rise, or may give rise, to a right to damages, but those damages are not the subject of the contract. They arise from the breach of the contract, and therefore they are in no sense the subject of the contract itself. When a man contracts that he will do a thing, it can hardly be taken as implying a contract as to what will arise if he does not do the thing. In the same manner with regard to tort, the right to damages for tort does not arise from any implied contract that if I do a wrong I will indemnify the person wronged for the wrong I have done. It is the common law right which everybody has to damages for a wrong which has been done to him. Therefore the right to such damages is not a right to indemnity, although when you come to ascertain what the measure of damages is, it may be that indemnity will properly express that measure of damages.

[16] Lastly, in *Krishnaswami Iyer v Raghaviah Chetty* AIR 1928 Mad 43, Venkatasubba Rao J said:

> Now in the case of contracts, right to indemnity must be carefully distinguished from right to damages. A right to indemnity is given by the original contract, whereas a right to damages arises in consequence of the breach of that contract. These two rights are confounded and one reason for the confusion is that when a contract is broken, indemnity is often found to coincide with the measure of damages. In these cases, whether the right is called right to indemnity or right to damages, practically the same result follows, and it is forgotten that these two words express two fundamentally different legal ideas.

[17] In the case before us, if you take the words of the promise made by the defendant and already quoted in para 9 of this judgment and test them against the definition in s 77 of the Contracts Act, it is clear as crystal that the defendant has promised to save the plaintiff from loss caused to the plaintiff by the conduct of the defendant himself. In the words of Venkatasubba Rao J in *Krishnaswami Iyer v Raghaviah Chetty* this is 'a right to indemnity is given by the original contract' and not a mere right to damages. Accordingly, it is my judgment that upon its true construction, the defendant's promise in this case is an indemnity.

[18] It follows from what I have said thus far that it was imperative for the plaintiff bank to prove that it suffered the losses alleged in its pleaded case. That is what the learned judge held:

> and I am in agreement with him. It is common ground that the plaintiff did not prove its losses.

[19] During argument, learned counsel for the plaintiff has repeatedly relied on the fact that at the commencement of the trial, both sides agreed that the issue of liability should be tried first and that the issue as to damages should be left to be dealt with later. Meaning no disrespect to learned counsel, his repetitious submission has left me unimpressed. In my judgment, it is not of moment that this was, to borrow the expression used by counsel, 'a split trial'. In the course of proving the defendant's liability, it was incumbent on the plaintiff to establish its loss as *an essential ingredient* of its cause of action. Once, as found by the learned judge, the loss went unproved, the plaintiff's cause of action against the defendant was not established. On the facts of this case, the learned judge was well entitled to come to the conclusion that he did.

[20] One last point. There are two motions before us. There is the plaintiffs motion to admit the sealed order. This is a formality and I would grant an order in terms of that motion. There is also the defendant's motion to dismiss this appeal for failure on the part of the plaintiff to obtain leave to appeal on the ground that the subject matter was below the limit RM250,000 fixed by s 68 of the Courts of Judicature Act 1964. As I indicated during argument, this is a frivolous application lacking any merit. The value of a claim, in the context

of s 68(1)(a) is to be viewed from an appellant's standpoint. Here, the pleaded value of the plaintiff's claim exceeds the statutory trigger.

[21] In *Meghji Lakhamshi and Brothers v Furniture Workshop* [1954] AC 80, the board of the Privy Council was concerned with art 3(a) of the Eastern African (Appeal to Privy Council) Order of Council 1951, which provided that an appeal shall lie as a right from any final judgment of the Court of Appeal 'where the matter in dispute on appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards'. Upon a preliminary objection to jurisdiction, the board held that leave to appeal had been rightly granted. Lord Tucker who delivered the advice of the board said:

> The article provides that an appeal shall lie as of right from any final judgment of the Court of Appeal 'where the matter in dispute on the appeal amounts to or is of the value of £500 sterling, or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the said value or upwards'. Leave was granted by the Court of Appeal for Eastern Africa on affidavits to the effect that the capital value of the plot in question exceeded £500. The respondents contended that the true test is how much it is worth to the appellants to succeed in the appeal, and that this is to be measured by deducting from the value of the land with vacant possession its value to the owners subject to the statutory tenancy, and that as no evidence of this had been adduced there was no jurisdiction to fix the conditions on compliance with which the final order giving leave to appeal would issue. It is quite possible that a case may fall in whole or in part within more than one limb of Article 3(a), and it will suffice for an appellant to show that it comes within any one. It was laid down by this Board in *Macfarlane v Leclaire* (1862) 15 Moo PC 181 that '*the value of the subject-matter in dispute,' under corresponding legislation relating to Canadian appeals, must be determined by looking at the judgment as it affects the interests of the party who is prejudiced by it and who seeks to appeal.* The same test was applied in *Allan v Pratt* (1888) 13 App Cas 780 to a case of an appeal from a judgment awarding damages for personal injuries, it being held that the value was the sum awarded and not the sum claimed. More recently in *Lipshitz v Valero* (1948) AC 1 it was held that, where a tenant appellant had been evicted from a plot of land valued at £50 on which he had constructed a building at a cost of £450, the true test was whether it was worth £500 to him that the Rent Restriction Ordinance should be held to give him protection against an order to vacate the land leaving on it a building which had cost him £450 to erect. The first two of these cases were dealing only with the value of 'the subject-matter in dispute,' and it would appear that in the last case also it was the first limb of the article which was, primarily at any rate, under consideration. *Their Lordships have no doubt that under whichever limb of the article any case may fall, the 'value' must be looked at from the point of view of the appellant*, with the result that an appeal may sometimes lie where the landlord is the appellant although there could be no appeal by the tenant, or vice versa.

[22] So too here. As I have already said, the appealable limit fixed by s 68(1)(a) must be viewed from an appellant's standpoint. I would therefore dismiss the

A defendant's motion and order that the costs of the motion be paid by the defendant to the plaintiff.

[23] Before concluding, I must mention that the judgment under appeal is that of Mohd Saari Yusof J, (later JCA). It is one of the last few of his judgments that we shall see in this court. He has since retired. Speaking for myself, I shall
B miss his simple and direct style of writing.

[24] I now conclude as I began. This is a rather simple case. It has perhaps been made complex by the plaintiff's failure to appreciate the true nature of the promise it had extracted from the defendant. That failure has led to much
C confusion in its mind.

[25] For the reasons already given, I would dismiss this appeal and affirm all the orders made by the learned trial judge. The appellant bank must pay the costs of this appeal. These costs will not include the costs of its motion to admit the sealed order of the High Court as part of the record of appeal.
D However, the respondent must pay the costs of its motion to be taxed on a separate bill. These costs are to be set off against the costs receivable by the respondent from the appellant.

[26] My learned brother Abdul Kadir Sulaiman JCA has read this judgment in draft and agrees with the reasons and conclusions stated herein.

E *Appeal dismissed.*

Reported by AG Kalidas

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